HONG LEONG MARKETING CO BHD

v.

SUMERIA DAIHON ENGINEERING SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[CIVIL SUIT NO: D1-22-36-93]
16 JANUARY 1997

CIVIL PROCEDURE: *Amendment - Judgment - Amendment to increase judgment sum - Wrong rate of interest used to calculate amount in judgment - Correct rate stated in application - Whether defendants prejudiced if amendment allowed - Whether judgment correctly stated what court actually decided - Rules of the High Court 1980, O. 20 r. 11*

The plaintiff had obtained judgment in default of appearance against the three defendants on 30 September 1994 for RM185,396.14 with interest at 1.5% per annum, in respect of goods sold on credit to the 1st defendant. The 2nd and 3rd defendants were guarantors of the credit facilities. On 22 September 1995, the plaintiff applied to amend the default judgment under O. 20 r. 11 of the Rules of the High Court 1980 ('RHC') increasing the judgment sum from RM185,396.14 to RM232,895.86 on the grounds that the calculation of interest should not have been 1.5 % per annum as stated in the affidavit of the plaintiff's credit officer, but should rightly have been at the rate of 1.5% per month as stated in the application for default judgment. An acknowledgment of debt by the defendants where interest was specified at 1.5% per month was exhibited in support of the application. The defendants entered appearance and objected to the application but did not apply to set aside the default judgment.

Held:

[1] Generally, an application to amend a judgment or order because of a clerical mistake, or accidental slip, or omission based on O. 20 r. 11 of the RHC is allowed provided the application falls within the ambit of the rule.

[2] In the present application, the mistake arose from an error in multiplication in the actual calculation of interest in the table, appended to the affidavit in support of the original application for default judgment. The application itself sought interest at the rate of 1.5% per month. The mistake did not operate to the prejudice of the defendants, and was clearly within the ambit of "a clerical mistake or error arising from an accidental slip or omission". The judgment did not correctly state what the court intended

to decide and had actually decided. Furthermore, the defendants did not at any time contend that the rate of interest of 1.5% per month was not the correct rate, nor did they apply to set aside the default judgment.

[Application allowed.]

Cases referred to:
Armitage v. Parsons [1908] 2 KB 410 ***(refd)***
Navimprex Centrala Navala v. George Moundreas & Co SA [1983] 127 Solicitors' Journal 392 ***(foll)***
Philips Securities (Pte) v. Yong Tet Miaw [1988] 3 MLJ 61 ***(refd)***
Tong Lee Hwa and Another v. Chin Ah Kwi, Tong Chong Fah v. Chin Ah Kwi [1971] 2 MLJ 75 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 11
Rules of the Supreme Court 1970 [Singapore], O. 19 r. 9
Rules of the Supreme Court [UK], O. XXVIII r. 11

For the plaintiff - Simon Hue Fook Chuan; M/s Ho, Loke & Koh
For the defendants - Zafuan Yazi Yahya; M/s Azalina, Chan & Chia

Reported by Anne Khoo

JUDGMENT

T Selventhiranathan J:

The plaintiff claimed against the three defendants a total sum of RM271,077.96, with interest on the principal sum of RM250,872.50 at the rate of 1.5% per month from 1 November 1992 until settlement. The plaintiff stated that it had from time to time sold and delivered goods to the first defendant for the purpose of the latter's business on credit, in respect of which credit facilities the second and third defendants were guarantors. The plaintiff alleged that despite demands having been made, the defendants had failed to settle the outstanding sum.

On 14 September 1994 the plaintiff applied *vide* encl. (9) for an order to enter judgment against the first and third defendants (hereinafter "the defendants" collectively) for the balance outstanding sum of RM185,396.14, together with interest upon the principal sum of RM160,872.50 at the rate of 1.5% **per month** from 28 April 1994 until settlement. The application was supported by the affidavit in encl. (8) of the credit officer of the plaintiff showing calculation of interest at the rate of 1.5% **per annum**. He also exhibited in his affidavit an acknowledgment of debt by the defendants where interest was specified as being at 1.5% **per month**. It was therefore clear that the

calculation of interest by the credit officer at 1.5% per annum was made in error. However, this was not discovered at that point of time and judgment was entered against the defendants before another judge on 30 September 1994 for the balance outstanding sum of RM185,396.14, with interest having been erroneously calculated at 1.5% per annum on the principal sum, although the application itself stipulated interest as being calculated at 1.5% per month. Although the defendants had been served with the writ of summons and endorsed statement of claim, they did not enter any appearance then, and the judgment entered against them was therefore in default of appearance.

On 22 September 1995, the plaintiff applied *vide* encl. (20) to amend the default judgment entered on 30 September 1994 by increasing the judgment sum from RM185,396.14 to RM232,895.86. The application was supported by the affidavit in encl. (19) of the credit controller of the plaintiff who had earlier affirmed the affidavit in support of the application for the default judgment. He now deponed that he had made a mistake in exh. "A1" to his earlier affidavit in encl. (8) in calculating the interest at the rate of 1.5% per annum when the rate should have in fact been 1.5% per month. He further stated that the mistake was made unintentionally and sought to correct his earlier affidavit and the calculation of interest exhibited therein to reflect the correct sum due. The correct sum due calculated with interest at 1.5% per month was exhibited to encl. (19).

After the application to amend the judgment sum was filed, only then did the defendants enter appearance on 21 October 1995. The third defendant affirmed two affidavits (encls. (22) and (24)) on behalf of himself and the first defendant objecting to the application to amend the judgment sum. These two affidavits were to the effect that there had been negotiations between the plaintiff and the third defendant whereby the former had variously agreed to waive or reduce the rate of interest and to claim the principal sum only. These negotiations had been on an oral basis between the plaintiff's representatives and the third defendant. The latter contended that any amendment of the judgment sum would operate to the defendants' prejudice and ought not to be allowed. However, the defendants did not at any time contend that the rate of interest stipulated to be at 1.5% per month was not the correct rate.

The plaintiff's affidavit in reply in encl. (23), on the other hand, was to the effect that the defendants had themselves acknowledged the rate of interest to be at 1.5% per month and the negotiations adverted to by the third defendant was an agreement to settle the amount owing in instalments within one year from 30 November 1992. However, the defendants had failed to settle the amount owing as promised and judgment was entered against them subsequently.

In arguing the application to amend the judgment sum, Encik Simon Hue Fook Chuan for the plaintiff referred to the exhibits to the relevant affidavits and submitted that there had been a mistake in relation to the rate of interest applicable in that although it was clear that the interest on the principal sum was to be at 1.5% per month, yet the plaintiff's credit controller had mistakenly calculated the interest at 1.5% per annum. The third defendant had himself signed the acknowledgment of debt by the first defendant wherein the interest was stated to be at 1.5% per month. Furthermore, the defendants themselves had not taken any steps to set aside the default judgment.

Encik Zafuan Yazi Yahya for the defendants submitted that the plaintiff should have its own checks and balances and should have calculated the interest accurately. This was not a case of a typographical or related error where O. 20 r. 11 of the Rules of the High Court 1980 would apply. He submitted that the original application to enter judgment was never served on his clients and there were ongoing discussions between the parties to settle.

Encik Simon Hue in reply submitted that the mistake as to the rate of interest was a clear error where the "slip rule" applied and that the amendment should be allowed in the interests of justice. The default judgment had been entered for the remaining sum due and the defendants had not entered appearance at that time. Consequently, there was no requirement for them to have been served with the application for judgment. From the time the default judgment had been entered, the defendants had never questioned that the rate of interest applicable was 1.5% per month.

Having heard arguments, I allowed the application of the plaintiff to amend the judgment sum as I was of the view that the provisions of O. 20 r. 11 were applicable, although I must state that, apart from referring to that rule, the parties made no reference to any authorities to assist the court in any way.

It can be stated generally that an application to amend a judgment or order because of a clerical mistake in it, or because of an error arising in the judgment or order from any accidental slip or omission, based on O. 20 r. 11 alone is usually allowed provided the application falls strictly within the ambit of that rule. The reported cases on point which I have researched involved amending the original judgment sum by reducing it to a smaller amount and not *vice versa*. I have not been able to find a reported case where the Court had increased the original judgment sum, as was sought to be done in the present case.

In *Philips Securities (Pte) v. Yong Tet Miaw* [1988] 3 MLJ 61, Thean J of the High Court in Singapore affirmed on appeal an order made by the Registrar amending the judgment sum by reducing the same pursuant to an application

under O. 19 r. 9 of the Rules of the Supreme Court 1970 of Singapore (pertaining to the entering of judgment in default of pleadings, ie the defence, in that case). He also held that the application could have been equally made under O. 20 r. 11 of those Rules (which is in *pari materia* with O. 20 r. 11 of the Rules of the High Court 1980 of Malaysia).

Similarly in *Armitage v. Parsons* [1908] 2 KB 410, the English Court of Appeal, upon an application by the defendant to set aside a judgment entered for twelve shillings more than the sum that ought to have been entered, held that the defendant was not entitled to have the judgment set aside and that there was power to amend the judgment under O. XXVIII, r. 11 of the English Rules of the Supreme Court (in *pari materia* with O. 20 r. 11 of the Rules of the High Court 1980 of Malaysia), which ought to be exercised in the plaintiff's favour.

In *Navimprex Centrala Navala v. George Moundreas & Co. SA* [1983] 127 Solicitors' Journal 392, the English Court of Appeal affirmed a decision of Mustill J to amend a default judgment properly obtained by the plaintiffs by reducing the judgment sum under O. 20 r. 11 of the English Rules of the Supreme court. The default judgment contained an accidental error caused by the plaintiffs or their solicitors to inform the court that two of the thirteen items in the points of claim were no longer effective. As a result, the judgment sum was $63,400 too much. When the defendants applied to have the judgment set aside, the plaintiffs applied to have it amended so as to exclude the two items wrongly claimed, and to reduce the judgment sum accordingly. Mustill J amended the judgment instead of setting it aside.

The defendants appealed in that case on the ground that the said rule could not be invoked because the accidental slip was not that of the court but was that of one of the parties or their legal advisers in failing to inform the court of the two items in the points of claim which were no longer effective, thereby resulting in the judgment sum being excessive.

However, Ackner LJ, speaking for the Court of Appeal, stated as follows at p. 393 of the report:

> ... the administrative officer had made the order which he had intended to make, when he was so requested by the plaintiffs' advisers. However, there had been an accidental omission on their part not to ask for judgment in the sum claimed in the writ to be reduced by the elimination of the two items which were no longer effective. Because of that accidental omission on their part, the administrative officer had not made the order which he would have made if that accidental ommission had not occurred. Accordingly, having regard to the terms of RSC O. 20 r. 11, and to the decisons in *Muir v. Jenks* [1913] 2 KB

413, and *Craigmyle v. Inchcape* [1942] 1 Ch 394, there had been jurisdiction to amend the order in the manner in which Mustill J had done. Appeal dismissed.

In the application before me to amend the judgment sum, it was clear, from the facts of the case as gleaned from the statement of claim, the application to enter judgment in default of appearance at encl. (9) and to amend the default judgment in encl. (20) and the affidavits filed in support of and in opposition to the applications, that the mistake that occurred as to the judgment sum arose from an error in multiplication in the actual calculation of the interest in the table appended to the affidavit in support of the original application to enter the default judgment. That application itself sought interest at the rate of 1.5% per month. It cannot therefore be gainsaid that this was indeed an honest mistake which did not operate to the prejudice of the defendants in any way because the third defendant himself had signed the acknowledgment of debt on behalf of the first defendant wherein the imposition of interest at the rate of 1.5% per month was recognised. Furthermore, the defendants did not on their own at any time apply to set aside the default judgment as being entered for a sum which was incorrect. As the judgment had been entered for a smaller sum than what was actually due, it would have of course been to the advantage of the defendants to let sleeping dogs lie, although I hasten to add, in all fairness to them, that they may not have been conscious of the mistake until the application was made to amend the judgment sum. However, to my mind, the present case comes within the ambit of the guiding principles laid down by Ackner LJ in **Navimprex** in that, because of the mistake of the credit controller of the plaintiff in calculating the rate of interest at 1.5% per annum when it should have been at 1.5% per month, my predecessor had not made the order which she would have made if that mistake had not occurred. The error in the judgment sum clearly arose from the accidental slip made in the calculation by the credit controller of the plaintiff.

In *Tong Lee Hwa and another v. Chin Ah Kwi*, *Tong Chong Fah v. Chin Ah Kwi* [1971] 2 MLJ 75, Gill FJ, speaking for the then Federal Court, dealt with the power of a court to vary a consent judgment or any other judgment in the following terms at pp. 79 to 80 of the report of that case:

> After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement (see *Attorney-General v. Tomline* [1877-8] 7 Ch. D 388). *The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical mistake or an error arising from an accidental slip or omission, or (b) the judgment as drawn up does not correctly state what the court*

actually decided and intended to decide, in either of which cases the application may be made by motion in the action (see *Ainsworth v. Wilding* [1896] 1 Ch 673). The same rule must apply, *a fortiori*, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order. (Emphasis mine)

The judgment in the present case no doubt was not a consent judgment, even though the defendants had acknowledged the debt and did not enter appearance or dispute the claim of the plaintiff in any manner when judgment in default of appearance was entered on 30 September 1994. However, the general rule enunciated in **Tong Lee Hwa**, as emphasised above, relating to the varying or setting aside of judgments is applicable here. The mistake made by the plaintiff's credit controller in calculating interest at 1.5% per annum when it should have been calculated at 1.5% per month comes clearly within the ambit of "a clerical mistake or an error arising from an accidental slip or ommission". The said mistake also comes within the second category of cases mentioned in **Tong Lee Hwa**, ie, "the judgment as drawn up does not correctly state what the court actually decided and intended to decide" in that the court actually granted and intended to grant judgment in favour of the plaintiff with interest at 1.5% per month. Interest at this rate of 1.5% per month was stipulated in the judgment. The only mistake arose as to the judgment sum of RM185,396.86 which was arrived at by erroneously calculating interest at 1.5% per annum on the outstanding debt of RM160,872.50 whereas it should have been calculated at 1.5% per month on the same outstanding debt. This was therefore a clear case where the judgment of 30 September 1994 ought to be corrected as it arose from a clerical mistake or an error arising from an accidential slip or omission on the part of the plaintiff's employee within the meaning of O. 20 r. 11. I accordingly allowed the plaintiff's application to amend the judgment sum but awarded costs to the defendants.